No. 75-1713

In the Supreme Court of the United States

OCTOBER TERM, 1976

PILGRIM EQUIPMENT COMPANY, INC., ET AL., PETITIONERS

v.

W. J. USERY, JR., SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

WILLIAM J. KILBERG,
Solicitor of Labor,

CARIN ANN CLAUSS,
Associate Solicitor,

JACOB I. KARRO,
SANDRA MCCORMACK,
Attorneys,
Department of Labor,
Washington, D.C. 20210.

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Petitioners seek review of a determination that 60 operators of their laundry and dry-cleaning establishments are employees, and not independent contractors, within the meaning of the Fair Labor Standards Act.[1] They do not assert that the decision below creates a conflict among the circuits; rather, they state that the decisions have been uniformly adverse to their position (Pet. 8), and they contend that "[t]his remarkable unanimity" is attributable to a misunderstanding of the pertinent decisions of this Court (Pet. 8-10).[2] We submit, however,

[1]Act of June 25, 1938, 52 Stat. 1060, as amended, 29 U.S.C. 201 *et seq.*

[2]The petition cites decisions of the Fifth Circuit, including *Brennan* v. *Partida*, 492 F. 2d 707 (Pet. 8, n. 9). It could as well have cited, *inter alia*, *Hodgson* v. *Taylor*, 439 F. 2d 288 (C.A. 8); *Shultz* v. *Mistletoe*

that the decision below is consistent with the decisions of this Court. No further review is necessary.

1. This Court has held that, for purposes of the Fair Labor Standards Act and similar social welfare legislation, the common law tests of employment status do not apply. *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722, 726 (Fair Labor Standards Act);[3] *Goldberg* v. *Whitaker House Cooperative, Inc.*, 366 U.S. 28 (Fair Labor Standards Act); *Bartels* v. *Birmingham*, 332 U.S. 126, 130 (Social Security Act); *United States* v. *Silk*, 331 U.S. 704, 713 (Social Security Act); *National Labor Relations Board* v. *Hearst*, 322 U.S. 111 (National Labor Relations Act). The controlling principle is that "in the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service." *Bartels*, *supra*, 332 U.S. at 130; see also *Silk*, *supra*, 331 U.S. at 713; *Whitaker House*, *supra*, 366 U.S. at 33.

This definition is particularly appropriate in Fair Labor Standards Act cases. "'Employ' includes to suffer or permit to work." Section 3(g), 29 U.S.C. 203(g). As this Court has said, "[a] broader or more comprehensive coverage of employees * * * would be difficult to frame." *United States* v. *Rosenwasser*, 323 U.S. 360, 362.

2. The court of appeals correctly applied these principles, reviewing the findings of the district court in light of the five subsidiary considerations listed by this Court

Express Service, 434 F. 2d 1267 (C.A. 10); *Shultz* v. *Cadillac Associates, Inc.*, 413 F. 2d 1215 (C.A. 7); *Western Union* v. *McComb*, 165 F. 2d 65 (C.A. 6), certiorari denied, 333 U.S. 862; *Hodgson* v. *Ellis Transportation Co.*, 456 F. 2d 937 (C.A. 9); *McComb* v. *Homeworkers' Handicraft Cooperative*, 176 F. 2d 633 (C.A. 4), certiorari denied, 338 U.S. 900.

[3] *Rutherford* states that decisions under the "Labor and Social Security Acts" should be followed as persuasive evidence of the meaning of the Fair Labor Standards Act. 331 U.S. at 723.

as being pertinent to the determination of employment status (*Silk*, *supra*, 331 U.S. at 716; *Bartels*, *supra*, 332 U.S. at 130): "degree of control, opportunities for profit or loss, investment in facilities, permanency of relation, and skill required" (Pet. App. 4A-5A). The court summarized its conclusions as follows (Pet. App. 13A-14A):

> [T]hese operators are not allowed to control any meaningful portion of the business they allegedly run; Pilgrim manages the major variables which determine each operator[']s profit. The compensation scheme is such that there is never any real risk that an operator will suffer loss. Substantially all risk capital is supplied by Pilgrim. The relationship is fairly permanent and there is no operator who, as an economic entity, is capable of doing business elsewhere. No unique skill or initiative is required of the operators.

The error that petitioners claim to find in the decision below and the many others like it is the "distillation of the several [Supreme Court] criteria into one—economic realities" (Pet. 8). But we think it clear that the five subsidiary criteria considered by the court of appeals in determing whether the test of "economic reality" has been met are the criteria approved by this Court.[4] The court below correctly used them as "tools * * * to gauge the degree of dependence of alleged employees on the business with which they are connected" (Pet. App. 5A).

This test of economic dependence does not mean, as petitioners contend, that any person is an "employee" of every entity with which he or she does business,

[4] Petitioners' contention (Pet. 12) that the operators thought of themselves as independent contractors is irrelevant. "Employment" under the Act depends on economic realities, not subjective intent. See Pet. App. 12A-13A.

merely because all people "are necessarily dependent on those with whom they do business" (Pet. 9). The courts of appeals use "dependence" not in the sense that each person is dependent upon many others, but in the sense that some people are especially "dependent" because their livelihood is "dependent upon finding employment in the business of others'" (*Mednick* v. *Albert Enterprises, Inc.*, 508 F. 2d 297, 300 (C.A. 5), quoting *Fahs* v. *Tree-Gold Co-op Growers, Inc.*, 166 F. 2d 40, 44 (C.A. 5)). This definition of economic dependence isolates employees from independent contractors; it does not support petitioners' concern that "*everyone*" (Pet. 7) will eventually be held to be an employee.[5] If such a result should come about, there will be time enough to correct it when it occurs. The present case, however, is correctly decided, and there is no conflict among the circuits.

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[5]Nor would the rationale of the decision below mean that the bandleaders in *Bartels* or the truck owners in *Silk* would be employees, as petitioners assert (Pet. 9). Unlike the instant pickup operators, the bandleaders in *Bartels* were not dependent on the operations of a single entrepreneur; they "contract[ed] with different ballroom operators to play at their establishments for a contract price" and "[a]lmost all of the engagements [t]here involved were one-night stands" (322 U.S. at 127). The relation between the bandleader and the operator was "transient," and it was the former who would "bear[] the loss or gain[] the profit after payment of [his musicians'] wages and the other band expenses" (*id.* at 132). In *Silk* the truckers owned their own trucks, hired their own helpers, undertook financial risk and had "the opportunity for profit from sound management" (331 U.S. at 719); and they "may and did haul for others when they pleased" (*id.* at 707).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

WILLIAM J. KILBERG,
Solicitor of Labor,

CARIN ANN CLAUSS,
Associate Solicitor,

JACOB I. KARRO,
SANDRA MCCORMACK,
Attorneys,
Department of Labor.

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